



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC APPEAL NO. 8 OF 2021

PETER NAKUPANG LOWAR....APPELLANT/APPLICANT

VERSUS

NAUTU LOWAR.....DEFENDANT/RESPONDENT

RULING

(On stay of execution of a decree arising from a judgment)

1. The Appellant being dissatisfied with the judgment delivered on 15/3/2021 by **Hon. M. I. G. Moranga** in the subordinate **Court case of Kitale CMC Land Case No. 66 of 2018** preferred the instant appeal from the judgment. After that, by a Notice of Motion dated 29/11/2021 brought under **Sections 1A, 1B, 3, 3A and 63 (e)** of the **Civil Procedure Act, Order 42 Rule 6** of the **Civil Procedure Rules** and “**all other enabling provisions of law**” he moved the Court for stay of execution of the decree of the Court.

2. The Appellant sought the following specific orders:

(1) ...spent

(2) That the Honourable Court be pleased to grant the applicant /appellant temporary stay of execution of judgment delivered on 15/3/2021 pending the hearing *interpartes* of the application and thereafter pending the hearing and determination of Kitale ELC Appeal No. 6 of 2021. (sic)

(3) That the costs of the application be provided for.

3. The Application was premised on the grounds that the appellant had appealed against the judgment, he had an arguable and meritorious appeal with a good likelihood of success, he stood to suffer irreparable prejudice, loss and damage unless the orders sought were granted and the appellant (*sic*) shall suffer no prejudice if the application was allowed as the applicant (*sic*) was in occupation of the suit land. Finally, he contended that it was in the interest of justice that that the prayers sought be granted.

4. The Application was supported by an affidavit sworn on the 29/11/2021 by **Peter Nakupiang Lowar**, the Appellant. The Affidavit largely echoed the contents of the grounds in support of the Application save for adding the annexures thereto. The deponent annexed the decree of the lower courts, a Memorandum of Appeal and an eviction order. He deponed that he had been in occupation of the suit land since **1995** and had nowhere else to move to hence he was likely to be thrown into the cold as a result of the eviction order which had been given to the police to execute.

5. The Application was opposed by way of a Replying affidavit sworn by the Respondent and filed on **10/12/2021**. His response was that the Application was incompetent, misplaced, lacked legal basis and ought to be struck out. His contention was that the Memorandum of Appeal and the Notice of Motion were at variance, and that the application was defective for lack of supportive evidence. He deponed that the Application was an afterthought, having been filed only after the Applicant was served with the eviction notice. He too annexed to his Affidavit a copy of the eviction notice and marked it as **NL1 (a), (b) and (c)**.

6. He stated that the application was belated as it was filed **9 months** from the date of delivery of judgment and no explanation for the delay was given. It was thus only meant to waste court's precious time. In addition, he stated that he ought not to be denied the fruits of his judgment without a just cause. His deposition was that if the stay was granted, then the appellant would be allowed to continue with the acts complained of in the lower court. His argument was that the appellant had neither demonstrated that the intended appeal had any chances of success nor shown that if the orders were not granted the appeal would be rendered nugatory or shown how he would suffer substantial loss if the orders were not granted. Lastly, he deponed that the applicant had not furnished any security for the due performance of the decree and that it was in the interest of fairness that the application be dismissed with costs.

SUBMISSIONS

7. Both parties filed submissions on the application as directed by the court on **1/12/2021**. The appellant filed his on **23/12/2021** and the Respondent on **29/12/2021**.

DETERMINATION

8. I have carefully read through the Application, the affidavits in support and opposition, the submissions on record, the case law relied on and the provisions cited. I find only two issues for determination. These are:

a) *Whether the order for stay of execution pending appeal should issue;*

b) *Who to bear the costs of this Application?*

9. While the Court is alive to the fact that the principles governing the grant of an order for stay of execution pending appeal are now settled, it may not be obvious to the parties in this matter. Perhaps that explains why learned counsel brought the instant Application under a number of provisions most of which were irrelevant. For instance, the Application was brought under a number of Sections of the Civil Procedure Act yet there are specific ones which govern the prayers sought. As a demonstration of the irrelevancy or confusion alluded to, the Applicant relied on **Section 1A** which provides for the Act, **1B** which deals with the duty of the Court in the realm of justice, **3** which provides for the special jurisdiction of the Court, **3A** which deals with the inherent powers of the Court and **63(e)** which provides for Supplemental Proceedings. Each of these provisions have specific situations they apply to and not the one of stay of execution pending appeal. The phrase “**all other enabling provisions of law**” is at best a meaningless and hollow line inserted by many a counsel to applications. While it may allude to the omnibus situation **Article 159(2) (d)** of the **2010 Constitution** may have been intended to cure in many cases, it bears no import whether inserted in an application or not. Thus, a Court might never bother to consider it.

10. Having said the above, it would be in order to restate only the relevant cited provisions, the above notwithstanding. The relevant law governing applications for stay of execution pending appeal is **Order 42 Rule 6 1(2)** of the **Civil Procedure Rules**. The Rule states as follows:-

“(2) No order for stay of execution shall be made under subrule (1) unless-

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

11. Courts have often discussed substantially the issue of stay of execution. As such there is phelathora of decisions which guide this Court. One such decision is the case of *Halal & Another -vs- Thornton & Turpin [1963] Ltd [1990] eKLR the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag. JA)* held that:

“...thus the superior court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must of course, be made without unreasonable delay.”

*In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in the case of *Hassan Guyo Wakalo -vs- Straman EA Ltd (2013)* as follows:*

“In addition the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory.”

These two principles go hand in hand and failure to prove one dislodges the other.”

12. As held in the authority cited, the grant of an order of stay of execution is a discretionary one. However, in exercising it, the Court must act judiciously, within the confines of the law and not capriciously. On that point I am guided by the Court of Appeal decision in *COI & Arnother v Chief Magistrate Ukunda Law Courts & 4 Others [2018] eKLR*. To act judicious means that the Court considers all facts and the law and then makes a reasoned judgment. In **Brian A. Garner (2019). Black’s Law Dictionary, 11th Edition, Thompson Reuters, MN**, the term “judiciously” is defined to mean “to use sound judgment.” What it means is that the Court has to apply its mind to the circumstances of the case and the law as any reasonable (learned) person would and demonstrate or show it in its determination that it did so.

13. The purpose of an order for stay of execution pending appeal is to preserve the subject matter of the appeal. If the subject is not maintained before the determination of the appeal, then it would render the appeal nugatory or an academic exercise. I agree with the decision of the court in *RWW vs EKW (2019) eKLR* where it was held:

“.....the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However in doing so, the court should weigh this right against the success of a litigant who should not be

deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

14. It therefore means that the court should endeavor to balance the interests of both the successful party in litigation so as not to unnecessarily bar him from enjoying the fruits of judgment and that of the Appellant whose appeal may succeed and be rendered nugatory if stay of execution is not granted.

15. In the instant Application, judgment was delivered on **15/03/2021** and the appellant filed a Memorandum of Appeal dated **3/4/2021**, on **9/4/2021**. Thus, the Appellant came to this Court within the time allowed by law to file an Appeal. What he failed to do soon thereafter was to file the instant Application. But I have perused through the Memorandum of Appeal and it is my considered opinion that it raises arguable issues. That does not guarantee the issuance of the orders of stay of execution by this court without considering the merits of the Application. In any event the law, in **Order 42 Rule 6(1)** of the **Civil Procedure Rules**, provides that an appeal is not an automatic stay of execution of the decree of a Court.

16. The pertinent question to be answered here is: has the appellant satisfied the conditions for the grant of stay of execution pending appeal? I answer the question by analyzing the conditions step by step as I compare them with the facts of the instant case. In regard to the issue of delay, this court noted that judgment was delivered on **15/3/2021** and the Application filed on **30/11/2021**. That translated to a period of **eight and half (8½) months**. It is instructive to note that within that period, execution had not been commenced. The fact that the Applicant moved the Court upon an execution being commenced does not in my view prejudice him. Further, I am on the opinion that the period does not amount to inordinate delay.

17. On the issue of substantial loss, the applicant stated that he has been in occupation of that suit land since **1995** and is apprehensive that if evicted he risked being put out in the cold, and with nowhere to move to. For that, he stated that he would suffer substantial loss if the execution was not stayed. In my view, since the Applicant was in occupation of the land and could be removed if eviction proceeded, he demonstrated the substantial loss he would suffer if stay is not granted.

18. Although the applicant has not expressed whether he is ready to offer security of costs, this Court is of the opinion that the Applicant can be directed by the Court to do so. Thus, this court shall exercise its discretion regarding the security of costs to be offered by the Applicant and direct that he does so within the time to be stipulated in this ruling if he intends to proceed with the Appeal.

b) What orders to issue and who to bear the Costs of this Application?

19. The upshot is that the Application is allowed and a stay of execution of the decree of the **Court in Kitale CMC Land Case No. 66 of 2018** is granted on the following conditions:

a) The Applicant is hereby ordered to deposit in a fixed joint interest earning account in the names of both counsel for the parties the sum of Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000/=) only as security of costs within 14 days from the date of this ruling.

b) The applicant/appellant shall compile, file and serve a record of appeal within 60 days and move the Court appropriately towards the finalization of this Appeal within 180 days from the date of this ruling.

20. A further and last order of the Court is that failure by the Applicants to abide by any of the above stated two conditions within the fixed time lines will lead to an automatic lapse of the stay of execution herein irrespective of whether or not one condition shall have been met earlier than the failure of the latter. This matter shall be mentioned on **20/6/2022** to confirm compliance of this order.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 17TH DAY OF FEBRUARY, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE